No. 16-9493

In the Supreme Court of the United States

October Term, 2016

FLORENCIO ROSALES-MIRELES, *PETITIONER*,

v.

UNITED STATES OF AMERICA

ORIGINAL

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS OF THE FIFTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

FILED
JUN 05 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Petitioner Florencio Rosales-Mireles, by and through his undersigned attorney, and pursuant to Rule 39.1, Supreme Court Rules, and Title 18, United States Code, § 3006A(d)(7), respectfully moves this Honorable Court for leave to proceed *in forma pauperis*, and for leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of fees. Petitioner was represented by appointed counsel under the Criminal Justice Act of 1964, as amended, in the district court and the court of appeals. Leave to proceed *in forma pauperis* was never sought in any other court.

Respectfully submitted.

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DATED: June 5, 2017.

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QUESTION PRESENTED FOR REVIEW

In *United States v. Olano*, this Court held that, under the fourth prong of plain error review, "[t]he Court of Appeals should correct a plain forfeited error affecting substantial rights if the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." 507 U.S. 725, 736 (1993). To meet that standard, is it necessary, as the Fifth Circuit Court of Appeals required, that the error be one that "would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge?"

No. _____

In the Supreme Court of the United States

October Term, 2016

FLORENCIO ROSALES-MIRELES, Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE FIFTH CIRCUIT

Petitioner Florencio Rosales-Mireles respectfully prays that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on March 6, 2017.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

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OPINION BELOW

On March 6, 2017, a panel of the Fifth Circuit Court of Appeals entered its opinion affirming the judgment of the United States District Court for the Western District of Texas. The opinion is reported as *United States v. Rosales-Mireles*, 850 F.3d 246 (5th Cir. 2017), and a copy is attached to this petition as an appendix.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on March 6, 2017. This petition is filed within 90 days after entry of judgment. *See* SUP. CT. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED

The question presented involves Federal Rule of Criminal Procedure 52(b), which provides: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b).

STATEMENT

Petitioner Florencio Rosales-Mireles pleaded guilty to illegal reentry, in violation of 8 U.S.C. § 1326. The district court ordered that a presentence report be prepared to assist in sentencing. In

calculating the United States Sentencing Guidelines applicable to Rosales, the probation officer recommended a total offense level of 21. The probation officer calculated the total criminal history points at 13, resulting in a criminal history category of VI. Combined with Rosales's offense level, the advisory Guidelines range was 77 to 96 months' imprisonment.

The probation officer made a mistake, however, in calculating the criminal history score. The officer counted a 2009 Texas conviction of misdemeanor assault twice, assessing four criminal history points instead of two. Without the two extra erroneously applied criminal history points, Rosales's criminal history category was V, yielding an advisory Guidelines range of 70 to 87 months. Rosales did not object to the guideline calculation error.

Counsel for Rosales instead requested a below-Guideline sentence of 41 months. Counsel argued that, under proposed amendments to the illegal reentry guideline, §2L1.2, a 41-month sentence

would be a within-Guidelines sentence.[1] The district court denied the requested variance and sentenced Rosales to 78 months' imprisonment.

On appeal, Rosales argued that the district court plainly erred by calculating his Guidelines range based on double counting the prior conviction in his criminal history. The Government agreed that the district court committed a plain error. However, it argued that the error did not affect Rosales's substantial rights, and that the court of appeals should not exercise its discretion to remedy the error.

The court of appeals held that, by adding a total of four points to Rosales's criminal history score based on the same conviction, the district court had committed a plain error. *Rosales-Mireles*, 850 F.3d at 248–49. It also held that Rosales had satisfied the third prong of plain-error review. *Id.* at 249. Without the criminal history error, Rosales's Guidelines range would have been 70 to 87 months, rather than 77 to 96 months. *Id.* And the district court did

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[1] Those proposals, which produce significantly reduced sentences for many § 1326 defendants, have since been adopted. U.S. SENTENCING COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 36 (April 28, 2016). Available at http://www.ussc.gov/amendment-process/reader-friendly-amendments/reader-friendly-version-amendments-effective-november-1-2016 (last accessed on May 3, 2017).

not "'explicitly and unequivocally indicate that [it] would have imposed the same sentence . . . irrespective of the Guidelines range.'" *Id.* (quotation omitted).

Notwithstanding, the Fifth Circuit declared that it would not exercise its discretion under the fourth prong of plain error review to correct the error. *Id.* at 250. The court of appeals described its exercise of discretion as occurring "only where 'the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Id.* at 249–50 (quoting *United States v. Escalante-Reyes*, 689 F.3d 415, 419 (5th Cir. 2012) (en banc) (quoting *United States v. Puckett*, 556 U.S. 129, 135 (2009)). Such errors, the court said, are "'ones that would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge.'" *Id.* at 250 (quoting *United States v. Segura*, 747 F.3d 323, 331 (5th Cir. 2014)). It found there to be "*no* discrepancy between the sentence and the correctly calculated range," and thus "[w]e cannot say that the error or resulting sentence would shock the conscience." *Id.* (emphasis in original). The court of appeals affirmed the sentence. *Id.* at 251.

Petitioner respectfully submits that the Fifth Circuit applied a reformulated and heightened standard for the fourth prong of

plain error review that conflicts with decisions of this Court and other circuit courts of appeals, and has created an intracircuit split.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit Court of Appeals applied a reformulated and heightened standard for the fourth prong of plain error review in Rosales's case, which involved a sentencing error. The Fifth Circuit's standard conflicts with decisions by this Court, other courts of appeals, and is part of an intracircuit split. This Court should grant certiorari to clarify the correct standard to be used when the court of appeals must decide whether to exercise its discretion to correct plain sentencing error.

"A plain error that affects substantial rights may be considered, even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b). In *United States v. Olano*, 507 U.S. 725 (1993), this Court articulated the familiar four-prong approach to plain error review under Rule 52(b). If the first three prongs are satisfied—an error that is plain and affects the defendant's substantial rights—then "the court of appeals has authority to order correction, but is not required to do so." *Id.* at 735. The standard for exercising that discretion under the fourth prong "was articulated in *United States v. Atkinson*, 297 U.S. 157 (1936)." *Id.* at 763. It is this: "The Court of Appeals should correct a plain forfeited error affecting substantial rights if the error 'seriously affect[s] the fairness, integrity, or publish reputation of judicial proceedings.'" *Id.* at 736 (quoting *Atkinson*, 297 U.S. at 160) (alteration in *Olano*).

The Fifth Circuit, while quoting *Olano*'s fourth-prong standard, applied a reformulated and heightened standard—does the error "shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge.'" *United States v. Rosales-Mireles*, 850 F.3d 246, 250 (5th Cir. 2017) (quoting *United States v. Segura*, 747 F.3d 323, 331 (5th Cir. 2014)). This reformulation of the *Olano* standard comes from a dissent from the en banc decision in *United States v. Escalante-Reyes*, 689 F.3d 415 (5th Cir. 2012). *See id.* at 435 (Smith, J., dissenting). The dissent drew on this Court's decisions emphasizing that "[p]lain errors are those that are 'exceptional,' 'particularly egregious,' and 'undermine the fundamental fairness' of our [judicial] system[,]" but cited no precedent of this Court to justify its particular reformulation. *Escalante-Reyes*, 689 F.3d at 435 (Smith, J., dissenting) (quoting *Atkinson*, 297 U.S. at 160, and *United States v. Young*, 470 U.S. 1, 15–16 (1985)). Rather, the dissent set out to rebuke the regular application of *Olano* for what it considered an "unwarranted extension" of the fourth prong standard. *United States v. Hernandez*, 690 F.3d 613, 624 (5th Cir. 2012) (J. Smith, dissenting).

The Fifth Circuit's reformulation of the fourth prong of the plain error review conflicts with *Olano*, which rejected this sort of heightened standard for the exercise of discretion under the fourth prong. In adopting the *Atkinson* standard, *Olano* rejected suggestions in earlier cases that Rule 52(b) should be employed only in circumstances where "'a miscarriage of justice would otherwise result.'" *Olano*, 507 U.S. at 736–37 (quoting *Young*, 470 U.S. at 15 (quoting *United States v. Frady*, 456 U.S. 152, 163 n.14 (1982))). Moreover, the adoption of a "shock the conscience" standard would elevate plain error review to the level of substantive due process, where that stringent standard is intended to reach "only the most egregious official conduct" that "violates the decencies of civilized conduct." *County of Sacramento v. Lewis*, 523 U.S. 833, 846–47 (1998) (internal quotation marks and citations omitted). Additionally, by focusing on the fourth prong as an evaluation of the district judge's competency, the court of appeals' reformulation conflicts with this Court's decision in *Henderson v. United States*, which pointed out that "plain-error review is not a grading system for trial judges." 133 S. Ct. 1121, 1129 (2013).

Although this Court has emphasized that meeting the requirements of plain error should be difficult and reversal not automatic, it has continued to apply *Olano*'s formulation of the fourth prong.

See United States v. Molina-Martinez, 136 S. Ct. 1338, 1343 (2016); *Henderson*, 133 S. Ct. at 1127, 1129; *United States v. Puckett*, 556 U.S. 129, 135 (2009). This Court has thereby recognized that "appellate courts retain broad discretion in determining whether a remand for resentencing is necessary[,]" but it has not deviated from the *Olano* standard. *Molina-Martinez*, 136 S. Ct. at 1348.

The Fifth Circuit's reformulated heightened standard also conflicts with decisions in other circuits on plain sentencing error. The Tenth Circuit has stated, for example, that "we can think of few things that affect an individual's substantial rights or the public's perception of the fairness and integrity of the judicial process more than a reasonable probability an individual will linger longer in prison than the law demands only because of an obvious judicial mistake." *United States v. Sabillon-Umana*, 772 F.3d 1328, 1335 (10th Cir. 2014). It is for that reason that the Third Circuit "generally exercise[s its] discretion to recognize a plain error in the misapplication of the Sentencing Guidelines." *United States v. Dahl*, 833 F.3d 345, 359 (3d Cir. 2016). *See also United States v. Garrett*, 528 F.3d 525, 530 (7th Cir. 2008) (exercising discretion to correct plain error which resulted in a sentence one month greater than the correct Guidelines range because "even if a sentence imposed is within the correct *as well as* incorrect Guidelines range, the case

must still be remanded for resentencing") (emphasis in original). This Court should address the circuit split caused by the Fifth Circuit's use of a reformulated and heightened standard for the fourth prong of plain error review.

Additionally, the Fifth Circuit's decision in Rosales's case contributes to a growing intracircuit conflict on applying the fourth prong. Other recent decisions by the Fifth Circuit, both published and unpublished, have relied on the reformulated standard in declining to correct plain errors. *See United States v. Renteria-Martinez*, 847 F.3d 297, 301–02 (5th Cir. 2017), *reh'g en banc denied* (Mar. 17, 2017); *United States v. Mendoza-Velasquez*, 847 F.3d 209, 213 (5th Cir. 2017) (per curiam); *United States v. Solano-Hernandez*, 847 F.3d 170, 179 (5th Cir. 2017), *reh'g en banc denied* (Mar. 17, 2017); *United States v. Handy*, 647 F. App'x. 296, 300 (5th Cir. 2016).

But in other decisions applying the *Olano* standard, the Fifth Circuit "ha[s] often exercised [its] discretion to correct error when it resulted in a custodial sentence in excess of the correct Guidelines recommendation." *United States v. Putnam*, 806 F.3d 853, 856 (5th Cir. 2015) (per curiam). That includes cases, like this one, where the sentence imposed falls within an overlap between the correct and incorrect Guidelines ranges, and a degree of error of

approximately 10% exists between the sentence imposed and the comparative sentence under the correct Guidelines range. *See, e.g., United States v. Molina-Martinez*, 824 F.3d 548 (5th Cir. 2016), *on remand from* 136 S. Ct. 1338 (2016) (vacating sentence at bottom of incorrect range that would be 10% greater (seven months) than a sentence imposed at the bottom of the correct range); *United States v. De Santiago-Guillen*, 653 F. App'x 303 (5th Cir. 2016), *on remand from* 136 S. Ct. 1711(2016) (same); *United States v. Zavala*, ___ F. App'x ___, 2016 WL 3455947 (5th Cir. June 23, 2016), *on remand from* 136 S. Ct. 1711 (2016) (vacating sentence at bottom of incorrect range, which would be 11.5% greater (30 months) than a sentence imposed at the bottom of the correct range). The Fifth Circuit's inconsistent use of the reformulated and heightened standard on the fourth prong of plain error review results in criminal defendants in similar circumstances being treated differently. Some will have their sentences of imprisonment reduced and some will not based whether the panel applies the reformulated standard.

Because the Fifth Circuit's application of a reformulated and heightened standard on the fourth prong of plain error review conflicts with decisions by this Court, other courts of appeals, and has created an intracircuit split, this Court should grant certiorari.

CONCLUSION

FOR THESE REASONS, Rosales respectfully requests that this Honorable Court grant a writ of certiorari, vacate the opinion of the court of appeals, and remand the case for further review.

Respectfully submitted.

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APPENDIX

United States v. Rosales-Mireles,
850 F.3d 246 (5th Cir. 2017)

850 F.3d 246
United States Court of Appeals,
Fifth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Florencio ROSALES–MIRELES, also known as Roberto Lozano–Alcauter, Defendant–Appellant.

No. 16-50151
|
FILED March 6, 2017

Synopsis

Background: Defendant pled guilty in the United States District Court for the Western District of Texas, Sam Sparks, J., to illegal reentry, and he appealed.

Holdings: The Court of Appeals, Jerry E. Smith, Circuit Judge, held that:

[1] district court plainly erred when it double-counted defendant's prior misdemeanor assault conviction in calculating his criminal history score;

[2] district court's plain error did not warrant reversal of his sentence; and

[3] defendant's sentence was not substantively unreasonable.

Affirmed.

West Headnotes (7)

[1] **Criminal Law**
⇦ Necessity of Objections in General

To establish plain error, defendant must show (1) error; (2) that was clear or obvious; (3) that affected his substantial rights; and (4) that seriously affects fairness, integrity or public reputation of judicial proceedings.

Cases that cite this headnote

[2] **Criminal Law**
⇦ Sentencing and Punishment

When defendant is sentenced under incorrect Guidelines range, error itself can, and most often will, be sufficient to show reasonable probability of different outcome absent error, but government remains free to point to parts of record—including relevant statements by judge—to counter any ostensible showing of prejudice that defendant may make.

Cases that cite this headnote

[3] **Criminal Law**
⇦ Sentencing and Punishment

Sentencing and Punishment
⇦ Criminal history

District court plainly erred, in sentencing defendant for illegal reentry, when it double-counted his prior misdemeanor assault conviction in calculating his criminal history score, where error resulted in higher Guidelines range, and district court did not explicitly and unequivocally indicate that it would have imposed same sentence irrespective of Guidelines range.

Cases that cite this headnote

[4] **Criminal Law**
⇦ Sentencing and Punishment

District court's error does not seriously affect fairness, integrity, or public reputation of judicial proceedings, and thus does not warrant reversal on plain error review, simply because plainly erroneous sentencing guideline range yields longer sentence than range that, on appeal, is perceived as correct; rather, types of errors that warrant reversal are ones that would shock conscience of common man, serve as powerful indictment against system of justice, or seriously call into question district court's competence or integrity.

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1 Cases that cite this headnote

[5] **Criminal Law**
⇦ Sentencing and Punishment

District court's plain error in double-counting defendant's prior misdemeanor assault conviction in calculating his criminal history score in sentencing him for illegal reentry did not seriously affect fairness, integrity, or public reputation of judicial proceedings, and thus did not warrant reversal of his sentence, even though there was reasonable probability that defendant would have been subject to different sentence but for error, where sentence imposed was in middle of properly calculated sentencing range.

Cases that cite this headnote

[6] **Sentencing and Punishment**
⇦ Factors or Purposes in General

Sentencing and Punishment
⇦ Operation and effect of guidelines in general

Within-guidelines sentence is entitled to presumption of reasonableness, which is rebutted only upon showing that sentence does not account for factor that should receive significant weight, it gives significant weight to irrelevant or improper factor, or it represents clear error of judgment in balancing sentencing factors.

Cases that cite this headnote

[7] **Aliens, Immigration, and Citizenship**
⇦ Sentencing and punishment

Sentencing and Punishment
⇦ Nature, degree, or seriousness of other misconduct

Defendant's 78-month sentence for illegal reentry was not substantively unreasonable, despite defendant's contention that district court placed too much weight on his old, prior convictions, where sentence was in middle of properly calculated sentencing range, court explicitly considered statutory sentencing factors, including nature of offense, defendant's history and characteristics, and need to protect public, deter future criminal conduct, and promote respect for law, and court noted that it was defendant's second conviction for being in United States illegally, that he had used multiple aliases to remain in United States, and that he had history of assault. 18 U.S.C.A. § 3553(a).

Cases that cite this headnote

*248 Appeal from the United States District Court for the Western District of Texas, Sam Sparks, U.S. District Judge

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Before SMITH, CLEMENT, and SOUTHWICK, Circuit Judges.

Opinion

JERRY E. SMITH, Circuit Judge:

Florencio Rosales–Mireles appeals his sentence for illegal reentry. He contends that the district court erred by counting one of his prior convictions twice when calculating the sentencing-guideline range. He also maintains that the sentence is substantively unreasonable. Finding no reversible error, we affirm.

I.

Rosales–Mireles pleaded guilty of illegal reentry in violation of 8 U.S.C. § 1326(a) and (b)(2). When calculating the criminal-history score, the probation officer counted a 2009 Texas conviction of misdemeanor assault twice, assessing two criminal-history points each

time it was counted. The total criminal-history score was calculated as 13, resulting in a criminal-history category of VI. Combined with Rosales–Mireles's offense level of 21, that criminal-history category yielded a guideline range of 77–96 months.

Rosales–Mireles did not object to the double-counting but did request a downward departure to 41 months. The district court denied the departure and sentenced Rosales–Mireles to 78 months of imprisonment and a three-year term of supervised release. Rosales–Mireles did not object to the sentence after it was imposed.

II.

[1] Rosales–Mireles assigns error to the double-counting. He concedes that he did not make that objection in district court, so we apply the plain-error standard. *See United States v. Peltier*, 505 F.3d 389, 391 (5th Cir. 2007). To establish plain error, Rosales–Mireles must show (1) an error; (2) that was clear or obvious; and (3) that affected his substantial rights. *Puckett v. United States*, 556 U.S. 129, 135, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009). "[I]f the above three prongs are satisfied, [we have] the *discretion* to remedy the error—discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (quotation marks and alterations omitted).

A.

The government concedes that the double-counting is error, and we agree. The sentencing guidelines provide that two criminal-history points be added "for *each* prior sentence of imprisonment of at least sixty days...." U.S. Sentencing Guidelines Manual ("U.S.S.G.") § 4A1.1 (emphasis added). By adding four points based on the same conviction, the court erred. *249 Moreover, "the error is clear from the language of the Guidelines."[1] Thus, Rosales–Mireles satisfies the first two prongs.

B.

[2] To satisfy the third prong, Rosales–Mireles must show "a reasonable probability that, but for the district court's misapplication of the Guidelines, he would have received a lesser sentence."[2] "When a defendant is sentenced under an incorrect Guidelines range ... the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." *Molina–Martinez*, 136 S.Ct. at 1345. But "[t]he Government remains free to point to parts of the record—including relevant statements by the judge—to counter any ostensible showing of prejudice the defendant may make." *Id.* at 1347 (quotation marks omitted and alteration adopted).

Had the district court not erred by double-counting Rosales–Mireles's misdemeanor-assault conviction, the guideline range would have been 70–87 months instead of 77–96 months as recommended in the presentence report. Nonetheless, the government contends that the court would have sentenced Rosales–Mireles to the same term of imprisonment even if it had not erred by double-counting. The government notes that the district court stated that it "would have not sentenced [Rosales–Mireles] to anything less than the 78 months."

But that statement, in context, does not go quite so far as saying that the court would have sentenced Rosales–Mireles to 78 months regardless of the guideline recommendation. The full statement is this: "I'll let the record reflect that under the consideration 4A1.3, when I look at the elements, I would have not sentenced Mr. Rosales to anything less than the 78 months after he's—his conduct in these cases and his conduct here today."

[3] The explanation was made in the context of denying a downward departure under U.S.S.G. § 4A1.3. Moreover, the denial was based, in part, on Rosales–Mireles's criminal history, and that history—because of the double-counting—erroneously included an extra conviction. Thus, we cannot say that the district court "explicitly and unequivocally indicate[d] that [it] would have imposed the same sentence ... irrespective of the Guidelines range."[3] Rosales–Mireles has met his burden, under the third prong, to show a reasonable probability that he would have been subject to a different sentence but for the error.

C.

[4] Even though Rosales–Mireles has satisfied the first three prongs, we must decide whether to exercise our

discretion to remedy the error. We do so only where "the error seriously affect[s] the fairness, integrity or public reputation of judicial *250 proceedings."[4] "The fourth prong ... is not satisfied simply because the 'plainly' erroneous sentencing guideline range yields a longer sentence than the range that, on appeal, we perceive as correct." *United States v. Sarabia-Martinez*, 779 F.3d 274, 278 (5th Cir. 2015).[5] Rather, "[t]he types of errors that warrant reversal are ones that would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge." *United States v. Segura*, 747 F.3d 323, 331 (5th Cir. 2014) (quotation marks omitted).[6]

[5] We decline to exercise our discretion in this case. We sometimes exercise discretion to correct a plain error where the imposed sentence is "materially or substantially above the properly calculated range." *United States v. John*, 597 F.3d 263, 289 (5th Cir. 2010).[7] But we also have declined to use that discretion even where the discrepancy was huge.[8] Where the difference between the imposed sentence and the properly calculated range is small, we generally decline to correct the error.[9]

Here, there is *no* discrepancy between the sentence and the correctly calculated range. The court sentenced Rosales-Mireles to 78 months, which is in the middle of the proper range of 70–87 months. We cannot say that the error or resulting sentence would shock the conscience. Thus, we elect not to exercise our discretion.

III.

Rosales-Mireles contends that his sentence is substantively unreasonable because it is greater than necessary to effect the goals of 18 U.S.C. § 3553(a). Rosales-Mireles did not object to reasonableness in the district court, so we review only for plain error.[10]

[6] A within-guidelines sentence is entitled to a presumption of reasonableness, *251 and "[t]he presumption is rebutted only upon a showing that the sentence does not account for a factor that should receive significant weight, it gives significant weight to an irrelevant or improper factor, or it represents a clear error of judgment in balancing sentencing factors." *United States v. Cooks*, 589 F.3d 173, 186 (5th Cir. 2009). Rosales-Mireles's 78-month sentence is within-guidelines, as it is within the overlap of the correct (70–87 months) and incorrect (77–96 months) ranges. It is therefore presumed reasonable. *Id.*

[7] Rosales-Mireles has not rebutted the presumption. He maintains that the district court placed too much weight on his old, prior convictions. But the court considered that argument during sentencing and rejected it. The court explicitly considered a number of the § 3553(a) factors, including the nature of the offense; Rosales-Mireles's history and characteristics; and the need to protect the public, deter future criminal conduct, and promote respect for the law. In addition, the court noted that this was Rosales-Mireles's second conviction for being in the United States illegally, that he had used multiple aliases to remain in the United States, and that he had a history of assault stretching from 2001 to 2015.

The district court was in the best position to evaluate Rosales-Mireles's history and characteristics and the need for the sentence to further the objectives in § 3553(a). *See Gall v. United States*, 552 U.S. 38, 51–52, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007). Accordingly, the decision is entitled to deference. *Id.* Rosales-Mireles has not rebutted the presumption of reasonableness.

The judgment of sentence is AFFIRMED.

All Citations

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Footnotes

1 *United States v. Espinoza*, 677 F.3d 730, 736 (5th Cir. 2012). *See also United States v. Blocker*, 612 F.3d 413, 416 (5th Cir. 2010), *abrogated on other grounds by Molina-Martinez v. United States*, ——U.S. ——, 136 S.Ct. 1338, 194 L.Ed.2d 444 (2016) ("As our conclusion is reached by a straightforward application of the guidelines, the error was also plain.").

2 *United States v. Martinez-Rodriguez*, 821 F.3d 659, 663–64 (5th Cir. 2016) (quoting *United States v. Pratt*, 728 F.3d 463, 481 (5th Cir. 2013) (citation omitted)).

3 *United States v. Miller*, 657 Fed.Appx. 265, 270 (5th Cir. 2016) (per curiam). *See also United States v. Mudekunye*, 646 F.3d 281, 290 (5th Cir. 2011) (per curiam).

4 *United States v. Escalante–Reyes*, 689 F.3d 415, 419 (5th Cir. 2012) (en banc) (quoting *Puckett*, 556 U.S. at 135, 129 S.Ct. 1423 (alteration in original)).

5 *See also United States v. Wooley*, 740 F.3d 359, 369 (5th Cir. 2014) ("This circuit has repeatedly emphasized that even when we find that the first three factors have been established, this fourth factor is not automatically satisfied.") (quotation marks omitted); *United States v. Ellis*, 564 F.3d 370, 378 (5th Cir. 2009) ("Not every error that increases a sentence need be corrected by a call upon plain error doctrine.").

6 *Accord United States v. Mendoza–Velasquez*, 847 F.3d 209, 213 (5th Cir. 2017) (per curiam) (citing *United States v. Scott*, 821 F.3d 562, 571 (5th Cir. 2016)).

7 *See, e.g., John*, 597 F.3d at 285–86 (exercising discretion to correct a sentence 21 months outside the correct range); *United States v. Hernandez*, 690 F.3d 613, 621–22 (5th Cir. 2012) (exercising discretion to correct a sentence 12 months outside the correct range); *Mudekunye*, 646 F.3d at 290–91 (exercising discretion to correct a sentence 19 months outside the correct range).

8 In *United States v. Wikkerink*, 841 F.3d 327, 337 (5th Cir. 2016), we declined relief under the fourth prong despite that the "correct sentence according to the Guidelines would have been 180 months [but] the district court ultimately imposed a sentence of 360 months."

9 *See, e.g., United States v. Avalos–Martinez*, 700 F.3d 148, 154 (5th Cir. 2012) (per curiam) (declining to exercise discretion where the imposed sentence exceeded the correct range by only one month); *United States v. Emanuel–Fuentes*, 639 Fed.Appx. 974, 977 (5th Cir. 2015) (per curiam) (same).

10 Rosales–Mireles notes that "[t]here is a circuit split as to whether a failure to object to the reasonableness of the sentence upon its imposition requires plain error review." He acknowledges that his argument is foreclosed, *see Peltier*, 505 F.3d at 391–92, and he raises it only to preserve it for further review.

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